NEW YORK LAW SCHOOL

NYLS Law Review
Vols. 22-63 (1976-2019)

Volume 47 | Issue 1 Article 10

January 2003

ANTITRUST AND ANTIDUMPING: FOREVER SEPARATE TABLES?

Gary Hufbauer

ANTITRUST AND ANTIDUMPING: FOREVER SEPARATE TABLES?

GARY HUFBAUER*

Scholars and practitioners have long debated the merits of a unified legal regime to encompass both antitrust and antidumping remedies.[1] The argument for a unified regime is straightforward. Within federal states, such as Australia, Brazil, Canada, Germany, India and the United States, there are no special remedies for anti-competitive behavior with respect to shipments that cross interstate borders. Within customs unions and free trade areas (FTAs), therefore, why should the legal regime allow special remedies for shipments that cross international borders? Isn't the whole idea to create a single market without discrimination between sources of supply?

The European Union, the Australia-New Zealand FTA, and the Canada-Chile FTA follow this argument to its logical conclusion: they abolish antidumping actions between the member states. Unfair pricing complaints are settled by resort to national competition laws, with no distinction made between intra-state and international trade.[2]

More typically, however, antidumping (AD) remedies are retained within free trade areas and even customs unions. For example, between 1995 and 2001, Argentina imposed 23 antidumping measures against its Mercosur partner, Brazil.[3] The New Zealand-Singapore FTA, signed in 2001, does not foreclose the use of AD

* Reginald Jones Senior Fellow, Institute for International Economics, Washington, D.C. The views expressed are the opinions of the author, and do not reflect the opinions of the Board, Director or Fellows of the Institute for International Economics.

1. An outstanding essay on the various dimensions of global competition policy is Edward M. Graham & J. David Richardson, *Issue Overview, in* GLOBAL COMPETITION POLICY (Edward M. Graham & J. David Richardson eds., 1997).

2. In the European Union, national judicial awards can, in some instances, be appealed to the European Court of Justice.

3. *See* WORLD TRADE ORGANIZATION, 2002 REPORT, *at* http://www.wto.org/english/tratop_e/adp_e/adp_ehtm.

remedies, even though neither country has imposed antidumping measures against the other in recent memory.[4]

The possibility of curtailing AD remedies was hotly debated in the context of the Canada-U.S. FTA (1989) and NAFTA (1994). Reports written by antitrust experts and academic scholars suggested that competition remedies could fill the legitimate gaps if antidumping was retired.[5] Trade practitioners hotly contested this vision.[6] The U.S. Congress agreed with the trade practitioners. In the Canada-U.S. FTA and NAFTA negotiations, despite Canadian pressure, the United States was adamant: the antidumping law could not be touched. In end, as a concession, the United States agreed to a supra-national review process, under Chapter 19 of NAFTA, to assess whether national determinations are consistent with national laws.

If limited headway has been made within the context of FTAs, no progress has been in the World Trade Organization. U.S. Ambassador Barshefsky stoutly refused to put antidumping on the negotiating table at the ill-fated Seattle Ministerial (1999). U.S. Ambassador Zoellick did agree to negotiate antidumping laws at the Doha Ministerial (2001), and for this concession he was sharply reprimanded in Congress. Only with strenuous lobbying by the Bush Administration was the Dayton-Craig amendment deleted from Trade Promotion Authority in the House-Senate conference.[7] Meanwhile, the Administration gave strong assurances to the Con-

4. The New Zealand-Singapore FTA, however, raises the *de minimis* threshold to 5 percent of imports, and at this level antidumping cases between the two partners will be rare. *See* Agreement On A Closer Economic Partnership, 2001, New Zealand-Singapore, art. 9, § 1(b).

5. For semi-official views, *see* CANADIAN CHAMBER OF COMMERCE, COMPETITION (ANTITRUST) AND ANTIDUMPING LAWS IN THE CONTEXT OF THE CANADA-U.S. FREE TRADE AGREEMENT (1991); AMERICAN BAR ASSOCIATION, REPORT OF THE TASK FORCE OF THE ABA SECTION OF ANTITRUST LAW ON THE COMPETITION DIMENSION OF NAFTA (1994). For less restrained advocacy, *see* Patrick A. Messerlin, *Competition Policy and Antidumping Reform: An Exercise in Transition*, *in* THE WORLD TRADING SYSTEM: CHALLENGES AHEAD, WASHINGTON D.C.: INSTITUTE FOR INTERNATIONAL ECONOMICS (Jeffrey J. Schott ed., 1996).

6. For a spirited argument against submerging antidumping remedies in the antitrust laws, *see* JOHN A. RAGOSTA & JOHN R. MAGUS, ANTIDUMPING AND ANTITRUST REFORM IN THE NAFTA: BEYOND RHETORIC AND MISCHIEF (Dewey Ballantine, 1996).

7. The Dayton-Craig amendment would have taken any negotiated change in U.S. trade remedy laws out of the "fast track" procedure. *See* 20 INSIDE U.S. TRADE, No. 31, at 1 (Aug. 2, 2002).

gress that close consultations would precede any inclusion of competition policy questions in trade negotiations.[8]

Against this background it's safe to predict that there will be no marriage between antidumping and antitrust in the WTO for the next twenty years. Instead I want to focus this short paper on the obstacles and opportunities for an engagement (if not marriage) between antidumping and antitrust in the context of free trade areas, particularly in the Western Hemisphere.

ENTRENCHED PROFESSIONAL INTERESTS.

The business of launching and defending AD investigations has turned into a growth industry. At the end of the Tokyo Round in 1979, Australia, Canada, the European Communities, and the United States accounted for the great majority of dumping investigation, then running at an annual rate of under 100 new cases a year. In 2001, 24 different countries initiated 348 antidumping cases. The "big four" launched 154 of those cases, while "new users" launched the other 194 cases. Underpinning the bare statistics are small armies of highly trained lawyers and public officials, spread across the globe, whose careers are geared towards AD litigation. Common sense tells us that no marriage between antidumping and antitrust can succeed if the nuptials are premised on retiring the armies of antidumping professionals.

DIFFERENT CORE OFFENSES.

Antitrust remedies center on three offenses: (a) price-fixing arrangements between competing firms, such as Sotheby's and Christie's or, on a grander scale, the Oil Country Tubular Goods cartel;[9] (b) mergers and acquisitions that threaten to erode competition, such as WorldCom's attempted purchase of Sprint in the telecom glory days; (c) outright monopolization, such as the case against Microsoft.

By sharp contrast, antidumping remedies center on the offense of aggressive competition, using cutthroat prices to capture market share. Cutthroat prices are a common feature – I would say an es-

8. *Id.*

9. For a good account of recent cartel behavior, *see* Simon J. Evenett et al., *International Cartel Enforcement: Lessons from the 1990s, in* THE WORLD ECONOMY (2001).

sential feature – of any market economy. Most goods and services are produced under conditions of high fixed costs and low variable costs. This is true of everything from tomatoes to transistors to telephone calls. Firms could not survive without selling in certain markets at prices well below average cost and below the prices charged in other markets. In the language of the antidumping statute, however, these are sales at "less than fair value" (LTFV), and attract a penalty duty when the goods come from abroad and injure domestic producers.

As these capsule descriptions suggest, there is little common ground between the core offenses tackled by antitrust and antidumping. One could go further and observe a doctrinal conflict between the two domains. Antitrust policy aims to foster sharp competition, at least until it reaches the realm of predatory behavior. Antidumping policy aims to limit sharp competition, well before it enters the predatory realm.

No one seriously proposes extending the scope of AD remedies to cover sales entirely within the domestic market. Indeed arrangements with a similar restraining effect – retail price maintenance laws, the Robinson-Patman Anti-Price Discrimination Act, regulated utility prices, and marketing boards – have fallen not only into academic disfavor but also into practical disuse. On the other hand, antidumping advocates are not about to trade their armor for ill-fitting antitrust remedies. The conclusion is that a marriage cannot be based on harmonized objectives.

MOVING THE TABLES CLOSER.

My observations, drawn from the dismal handbook of *realeconomik*, appear to leave little opportunity for an engagement, much less a marriage, even within a free trade area. But that conclusion would be too pessimistic. The remainder of my paper suggests that the natural process of economic integration in a free trade area will move the tables closer, and offers three suggestions for helping the process along.

NATURAL ATTRITION?

Within the borders of a free trade area, natural attrition of antidumping activity may occur – without any change in the legal re-

gime. There are two reasons why this could happen. First, as tariff and non-tariff barriers are abolished, mutual cutthroat competition becomes more practical. When firms are dumping into each other's markets – the normal state of affairs – each firm has less incentive to bring a case against its competitors. After all, the target firms can retaliate, and local public officials may lend a friendly ear to "echo" investigations.

Secondly, free trade areas are meant to encourage, and do encourage, direct investment between the partners. Crisscross investment patterns in turn dampen antidumping activity. It is one thing to bring an AD action against a totally foreign company; it is another thing to bring an action against the foreign subsidiary of a domestic competitor. For starters, the local competitor will argue that imports don't injure the domestic industry. If that argument does not kill the AD investigation, the local competitor will devise other ways to retaliate. The high incidence of steel AD actions is partly explained by the low incidence of foreign direct investment in the steel industry.

Table 1 provides evidence for the attrition hypothesis. The intensity of antidumping measures *between* NAFTA countries in the last seven years (1995-2001 inclusive) was about one-third the AD intensity *versus* the whole world (including NAFTA). Against NAFTA countries, the intensity was about 0.5 AD measures per $10 billion of imports; against the world, the intensity was about 1.8 AD measures per $10 billion of imports.[10]

Interestingly, NAFTA measures against the EU show a *very* low AD intensity, and EU measures against NAFTA show a low intensity. Trade barriers across the Atlantic are not high, while foreign direct investment is substantial. In other words, the same forces work outside a free trade area as well as within a free trade area to dampen AD activity.

By contrast, Table 1 shows a very high intensity of AD measures imposed by the Rest of the World (i.e., excluding the EU and NAFTA) against the Rest of the World – about 3.7 measures per

10. For a rigorous analysis of AD and other trade remedy actions in NAFTA, *see* John Wainio et al., *Trade Remedy Actions in NAFTA: Agriculture and Agri-Food Industries, Economic Research Service USDA and Montana State University* (Presented to the Policy Disputes Information Consortium Annual Workshop, Puerto Vallarta, Mexico, Mar. 6-9, 2002) (June 11, 2002).

$10 billion of imports. High trade barriers separate countries in this catchall category, and these countries do not have much criss-cross investment. Their bilateral exchange rates fluctuate rapidly, and the countries are at vastly different stages of development. In such conditions, AD measures flourish.

COMMON INVESTIGATION BODIES?

Chapter 19 of the NAFTA could provide the foundation for a common body to investigate AD petitions. Under Chapter 19, *ad hoc* arbitration panels are formed, at the request of any NAFTA party, to review national determinations in antidumping and countervailing duty cases. To a large degree, Chapter 19 panels have replaced national appeals courts. The next evolutionary step might entail the creation of a trilateral investigation commission to determine whether LTFV sales have occurred, applying the law of the importing country. If the commission worked well, the national laws defining LTFV sales might be harmonized after a decade or so. Eventually the commission's powers might be expanded to cover injury determinations as well as LTFV findings. When the Free Trade Agreement of the Americas (FTAA) is ratified, additional countries might become parties to the commission.

While this sort of supra-national AD commission may seem far-fetched, my forecast is that NAFTA antidumping institutions will be created on a faster timeline than NAFTA antitrust institutions. Such informal consultation as exists in the antitrust realm mainly occurs across the Atlantic, between the U.S. Justice Department and DG-4 in the European Commission. So far as I know, Canadian and Mexican competition policy authorities were not seriously consulted in two recent high-profile cases, WorldCom/Sprint and GE/Honeywell. Looking to the future, however, it may be possible to create joint NAFTA taskforces to review merger cases, price-fixing cartels, and monopolies. But it will take a much longer time, perhaps thirty years or more, before the NAFTA or FTAA members are willing to create a common court to hear antitrust cases.

SECTOR EXCLUSIONS?

The process of natural attrition can, perhaps, be "bound" – in the general sense of "tariff bindings" – by negotiated exclusions of

particular sectors from the scope of AD remedies. These would be sectors where tariff and non-tariff barriers have been close to zero for several years, where no AD cases have been brought for five years, and where the industry consensus favors exclusion. In the event one NAFTA member resurrects trade barriers, the exclusion would evaporate. Obvious starting exclusions for NAFTA are autos, chemicals and electronics.

The purpose of sector exclusions would resemble the purpose of many other trade agreements – to record and codify existing practice. It should not be expected that exclusions would cover sectors where AD activity promises to be lively. In the NAFTA and FTAA context, we can expect many AD cases in agriculture, as quotas and tariffs are dismantled. We can also expect many cases in the textile and clothing sector, not because of NAFTA liberalization, but as a ricochet from FTAA and global liberalization.

MONEY DAMAGES AND THE LESSER DUTY RULE?

In private antitrust litigation, money damages are the staple remedy. The United States applies a hallowed, but peculiar, treble-damage concept. The base amount is actual damage suffered by the plaintiff, but a punitive element, equal to twice the base amount, is automatically built into the award. The antidumping statute contains its own version of punitive damages. AD duties are calculated to reflect LTFV margins; given the bizarre arithmetic built into margins, AD duties often exceed 50 percent *ad valorem.* Statistical analysis indicates that rates in excess of 30 percent sharply diminish imports, often to levels well below those that would compensate for injury suffered by the AD petitioner. At the same time, aside from the Byrd Amendment (found illegal by the WTO),[11] the AD regime does not pay money damages to the petitioner.

In the antidumping realm, this combination – the absence of money damages (apart from the Byrd Amendment) and the absence of an injury cap on AD duty rates — suggests a possible trade-off within NAFTA. AD rates could be capped by the actual extent

11. The WTO Panel delivered its final report to the parties on Sept. 2, 2002. The United States appealed the decision, and the WTO Appellate Body issued its report (confirming the Panel decision) on Jan. 16, 2003.

of injury, but AD duties could be paid to the petitioner as money damages. This reform could sharply reduce the average level of AD rates, and thereby limit the collateral damage to NAFTA commerce.

AD proponents might ask: why eliminate the punitive element from the antidumping regime, yet retain punitive damages (in the form of treble damages) in the antitrust regime? The best answer is that dumping, unlike price-fixing or monopolization, does not strike at the heart of a market economy. Instead dumping *is* the heart of a market economy. The AD regime is essentially a safeguard regime – safeguards for the beleaguered petitioner, not safeguards for the market system. Correctly characterized, the AD regime is a relief regime, not a guardian of capitalism. We don't pay punitive damages to welfare mothers and there's no reason to pay punitive damages to welfare corporations.

TABLE 1. INTENSITY OF ANTIDUMPING MEASURES

Region Imposing AD Measure	Target Region of AD Measure (number of cases, Jan. 1995 to Dec. 2001)			
	NAFTA	**EU**	**REST OF WORLD**	**WORLD**
NAFTA	31	1	255	287
EU	6	—	147	153
REST OF WORLD	39	17	570	626
WORLD	76	18	972	1,066

Importing Region	Source of Imports ($ billions, 2001)			
	NAFTA	EU	REST OF WORLD	WORLD
NAFTA	635	269	680	1,584
EU	204	1,310	750	2,264
REST OF WORLD	368	597	1,561	2,527
WORLD	1,207	2,176	2992	6,375

Importing Region AD Measure	Ad Measures per Ten Billion Dollars of 2001 Imports			
	NAFTA	**EU**	**REST OF WORLD**	**WORLD**
NAFTA	0.49	0.04	3.75	1.81
EU	0.29	—	1.96	0.68
REST OF WORLD	1.06	0.28	3.65	2.48
WORLD	0.63	0.08	3.25	2

Sources: For AD measures, WTO 2002 (www.wto.org/english/tratop_e/adp_e/adp_e.htm): for import data, IMF DOTS CD-ROM, May 2002